82-1863

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO.

NICHOLAS SILANO, Petitioner

V.

UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Do the provisions of the Speedy Trial Act, 31 USC 3161, *et seq* apply when the United States Government engages in an investigation with State or local officals and the defendant is indicted for the acts for which he was arrested, but the arrest is termed a "State arrest" ?

2. Does the Fifth Amendment to the United States Constitution bar sequential trials by the State and Federal governments of the same defendant for the same crime? Even if it does not, do policy considerations governing the overcrowding of the Court system and the Justice Department, the Justice Department's "Petite Policy," and the concept of State and Federal sovereignty, require State and Federal authorites to choose one forum?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the District Court rendered February 3, 1983, and the order of the United States Court of Appeals for the Second Circuit denying Petitioner's motion for a rehearing entered April 12, 1983 are reproduced in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 3, 1983. Petitioner's motion for a rehearing was denied April 12, 1983. Title 28 United States Code section 1254 grants the Court jurisdiction to review "By writ of certiorari...any...criminal case...after

rendition of judgment..." by a Court of Appeals.

STATUTES AND CONSTITUTIONAL PROVISIONS

31 U.S.C. 3161(b)

"Any information or indictment charging an individual with the commission of an offense shall be filed within thiry days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days."

31 U.S.C. 3162 (a)(1)

"If, in the case of any individual against whom a complaint is filed charging

such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the admimistration of justice."

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

"No person shall be held to answer for a capital, or otherwise infamous

crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or propery, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The Long Island Drug Enforcement Task Force (LIDETF) is a joint task force of federal, state, and local law enforcement officers. It is commanded by a DEA agent and completely funded, except for salaries of non federal personnel, by the federal

government. The LIDETF conducted a three year investigation of Richard Mager. On the morning of September 3, 1981 the LIDETF, including Drug Enforcement Agency (DEA) and state and local officers arrested petitioner and 20 other people and seized approximately 6000 pounds of marijuana. The Coast Guard arrested 12 people and seized two boats and approximately 22000 pounds of marijuana as part of the same operation. All of the marijuana was turned over to the DEA. Petitioner and the other defendants were indicted by the State of New York for possession of marijuana and petitioner went to trial on January 22, 1982. He was convicted in a jury trial at which one of the two main witnesses against him was introduced as a DEA agent, and sentenced to one to six years. He is now out on bail pending appeal.

On October 16, 1981 the Assistant United States Attorney told the Grand Jury he expected to seek an indictment the next week. No futher investigation was conducted, no additional evidence was produced, no additional defendants were produced. The Petitioner was indicted November 9, 1981, for conspiracy to import and possess a controlled substance with the intent to distribute; for possession of marijuana with the intent to distribute; and for importation into the United States from Columbia, S.A., of a substantial quantity of marijuana, in violation of 21 U.S.C. 841(1), 952(a), 960(a)(1).

The United States District Court for the Eastern District of New York had jurisdiction under 18 U.S.C. 3231 and 3232.

On May 25, 1982, Petitioner executed a post-indictment Speedy Trial waiver, but

specifically reserved his preindictment Speedy Trial rights. Petitioner filed motions to dismiss the indictment for denial of his right to a speedy trial and for violation of the Constitutional ban on double jeapordy and as a violation of the Justice Department's Petite Policy. The Motions were denied by the Magistrate on June 17, 1982. On June 25, 1982, petitioner renewed his motions to dismiss and the Honorable George C. Pratt, United States District Judge, denied the motions. Petitioner was convicted on all three counts in a jury trial. Petitioner filed a post verdict motion for acquittal which was denied July 29, 1982. On August 24, 1982 petitioner was sentenced to four years and fined five thousand dollars on each count to run concurrently, and a special parole term of five years.

Petitioner filed an Appeal with the United States Court of Appeals for the Second Circuit which was denied February 3, 1983. Petitioner filed a motion for rehearing which was denied April 12, 1983.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS OF INTERPRETATION OF THE SPEEDY TRIAL ACT.

The Second Circuit's opinion in this case raises important statutory and policy considerations concerning the interpretation of the Speedy Trial Act. This Act was passed in 1974 and the mandatory provisions did not become effective until July 1, 1980. Since this Court has not had an occasion to address these questions, there are compelling reasons why some definitive guidelines in the application of the Speedy Trial Act should now

be marked by this Court. Questions concerning the application of the Act are common and increasing now that the sanctions of the Act have become mandatory and defendants and lower courts, as well as federal prosecutors, urgently need the assistance of this Court in understanding the policies and language of the Act.

The Second Circuit took the lead in interpretation of the Act with its decision in United States v. Mejias, 552 F2d 435 (CA2 1977), but Mejias has created additional problems. The Second Circuit held in Mejias that the District Court should make a factual determination as to the degree of federal involvement to determine whether the Speedy Trial Act applied. The District Courts have had difficulty applying this test. See United States v. Leonard, 639 F2d 101, United

States v. Lia Ming Tanu, 589 F2d 82, United States v. Iaquinta, 674 F2d 260. Mejias was distinguished from United States v. Cabral 475 F2d 714 (1st Cir. 1973), but that created additional problems of interpretation.

The Court of Appeals for the Ninth Circuit has at least developed a simple rule to understand. Regardless of the degree of federal involvement, only a federal arrest triggers the Speedy Trial Act, United States v. Adams, 694 F2d 200 (9th Cir. 1982).

The Court of Appeals for the Fifth Circuit in United States v. Gravitt, 523 F2d 1211 and United States v. Avalos, 541 F2d 1100 said the court must look to the nature of the arrest. In United States v. Wilson, 657 F2d 755 they seemed to adopt the Adams rational, but in United States

v. Nixon, 634 F2d 306 they cited Avalos, Gravitt, Cabral, and United States v. De Pianne 459 F2d 151.

The Second Circuit listed three concerns in the application of the Act: interference with prosecutorial discretion; calendar congestion; and dual sovereignty and Petite Policy problems. Unfortunatly, the present situation contributes to all three problems.

A more literal interpretation of the Act would limit prosecutorial discretion, but that was the intent of the Act. An understandable rule regarding the application of the Act would let prosecutors exercise their legitimate discretion without having to guess at the meaning of the Act.

The confusion concerning the appli-

cation of the Act encourages appeals by the defendant and the government. A clarification of the Act would keep the government from bringing cases barred by the Act and would discourage Speedy Trial Act motions by defendants as well as eliminating most appeals by the government and defendants.

The present situation encourages federal prosecutors to manipulate the relationship between state and federal authorities and disregard the Petite Policy. If a federal prosecutor can use the sham of a "state" arrest to avoid the requirements of the Act, his incentive for full meaningful cooperation, or a clear delineation of rights and responsibilities between state and federal authorities is reduced. If a federal prosecutor were forced to decide whether to indict or not

shortly after arrest, he would have to decide whether the case was properly a state or federal case. An early decision would eliminate most Petite problems. In this case, if the government had complied with the provisions of the Speedy Trial Act, the State of New York would have been barred under 40 CPR 40.2 ("A person may not be separately prosecuted for two offenses based upon the same act or transaction....") from bringing the petitioner to trial, Abraham v. Justices of NY Sup Ct Bronx Co., 37 NY 2d 560, 376 NYS 2d 79, 338 NE 2d 597 (1975); and there would have been no state trial, no state appeal, no Petite question, no speedy trial or double jeopardy motions, no appeal on those grounds, and no petition for certiorari.

The Second Circuit interpretation of the Speedy Trial Act is open to serious

question. The Congress considered the questions raised by the Second Circuit and refused to amend the Act as requested by the Justice Department and the Judicial Conference. The Congress did liberalise the bases for "excludable" delay, but did not increase the time limits or provide exceptions such as Mejias attempted to create.

2. THE QUESTION OF DOUBLE JEOPARDY SHOULD BE REEXAMINED IN LIGHT OF THE COURT'S DECISIONS SINCE ABBATE V U.S. AND THE EFFECTS OF OF THE PETITE POLICY.

In Abbate v. United States, 359 US 187, (1959) the Court allowed double prosecution and conviction on the grounds of two sovereigns having different interests, but Justice Brennan, who wrote the majority opinion, felt compelled to file a separate opinion pointing out the

dangers in such multiple prosecutions. He cites Green v. United States, 355 US 184,187,

> "The underlying idea ... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

and United States v. Ball, 163 US 662, 669, "The prohibition is not against being twice punished, but against being twice put in jeapordy."

Justice Black, joined by Warren, C J. and Douglas, J. dissented in very clear language,

> "I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately. ... It is just as much an affront to

> human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a *State and once by the United* States, as it would be for one of these two Governments to throw him in prison twice for the same offense."

Petite v. United States, 361 US 529, reached the Court shortly thereafter and the government moved to vacate and remand the case to the District Court with direction to dismiss the indictment as being against the government policy of avoiding multiple prosecutions.

The Petite policy has been the policy, if not the practice, of the of the Justice Department since then. But the Justice Department has insisted that it is only an internal policy and confers no rights upon defendants even when it is violated, as in this case; and the Justice Department has been very careful in not allowing the question to reach this Court.

In every case where certiorari was granted, the government moved to vacate and remand to the District Court with instructions to dismiss because the prosecution violated the Petite policy. Hammons v. United States, 439 US 810, Frakes v. United States, 435 US 911, Rinaldi v. United States, 434 US 22, Croucher v. United States, 429 US 1034, Watts v. United States 422 US 1032, Ackerson v. United States, 419 US 1099, Hayles v. United States, 419 US 892, Thompson v. United States, 400 US 17, Marakar v. United States, 370 US 723.

While the Court has not had the opportunity to examine this issue since Abbate, it has examined the question of double jeapordy in the context of multiple state prosecutions and its interpretation

has evolved since Abbate. In Benton v. Maryland, 395 US 784, the Court overruled Palko v. Connecticut, 302 US 723, and held the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment.

In Ashe v. Swenson, 397 US 436, the Court held

> "The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then its applicablility in a particular case is no longer a matter to be left for state court determination within the broad bounds of fundamental fairness, but a matter of Constitutional fact we must decide through an examination of the entire record. ... The ultimate question to be determined ... is whether this established rule (collateral estoppel) of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is."

The Court was divided as to what was meant by collateral estoppel. Three concurring opinions and one dissent were filed. Justice Brennan, joined by Douglas, J. and Marshall, J. summarized the question

> "correction of the abuse of criminal process should not...be made to depend on the availability of collateral estoppel. Abuse of the criminal process is foremost among the feared evils that led to the inclusion of the Double Jeopardy Clause in the Bill of Rights. That evil will be most effectively avoided and the Clause can thus best serve its worthy ends if 'same offence' is construed to embody the 'same transaction' standard. Then both federal and state prosecutors will be prohibited from mounting successive prosecutions for offenses growing out of the same criminal episode."

If the question is too basic to be "left for state court determination," it is too basic to be left to unreviewable Justice Department policy.

The Petite policy as practiced has not honored the concept of dual sovereignty. Petitioner is aware of no cases where a state has prosecuted a defendant after the federal government prosecuted him. Multiple prosecution has simply meant that a U.S. Attorney could adopt a State's case and add a conviction to his record. It has added to court congestion by bringing cases that were already handled by the state court system. It has created needless appeals on the question of double jeopardy - certiorari has been granted in at least nine cases since Petite. It has been used as a means of harrassing a defendant who insists on his innocence by "subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." It has not contributed to deterrence. (Petitioner was

sentenced to one to six years at his state trial and four years to run concurrently with his state sentence at his federal trial.) It has contributed to the employment of attorneys and the work load of U.S. Attorneys.

While the facts of Abbate (Petitioners were convicted in Illinois of conspiring to injure or destroy the property of another, but the property was a federally operated and controlled communications system used by the Defense Department) make the decision understandable, practice has shown that the holding in Abbate has created far more problems than it has solved. Particularly today, with tight budgets, overcrowded courts, and overcrowded jails, the states are willing to defer to the federal government when there is a compelling

federal interest. The federal government should defer to the state when there is a compelling state interest.

A repudiation of Abbate would protect a basic right guaranteed by the Constitution and decrease court congestion and the work load of the Justice Department (at least ten trials, ten appeals, and ten petitions for certiorari since Petite with no apparent adverse affect on the enforcement of our laws.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO.

NICHOLAS SILANO, Petitioner

V.

UNITED STATES, Respondent.

APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3d day of February, one thousand nine hundred and eighty three.

Present:
HONORABLE WILLFRED FEINBERG
Chief Judge

HONORABLE AMALYA L. KEARSE
Circuit Judge

HONORABLE EDWARD D. RE*
Chief Judge, United States Court of International Trade

UNITED STATES OF AMERICA
Appellee,

against 82-1326

Nicholas Silano and 82-1328
Joseph W. Frank,
Appellants.

Appeal from the United States

District Court for the Eastern District

*Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be an it hereby is AFFIRMED.

1. Appellants claim that the trial court erred in not dismissing the indictment on speedy trial grounds. Appellant Frank does not appear to have made a speedy trial motion below; If so, he waived his right to make this argument on appeal. In any event, the claim is without merit. We are bound by United States v. Mejias, 552 F.2d 435 (2d Cir.), cert.

denied, 434 U.S. 837 (1977), a case not substantially distinguishable from this one. The district court did not err in determining that this case involved a state, rather than federal, arrest for speedy trial purposes.

2. Appellants' contention that the court erred in not granting a continuance so they could obtain trial testimony from the state trial is without merit. The "granting or denial of a continuance lies within the sound discretion of the trial court", United States v. Taylor, 562 F.2d 1345, 1363 (2d Cir.), cert. denied, 432 U.S. 909 (1977), and the court here did not err in refusing to grant a continuance where appellants had ample time prior to the trial to secure the materials sought and failed to do so.

3. Appellants' claim with respect

to double jeopardy violations and alleged violations of the Justice Department's Petite policy are wholly without merit. A federal prosecution following a state prosecution for substantially the same offense does not violate a defendant's protection against double jeopardy. In addition, putting to one side whether a violation of Department of Justice policy would entitle a defendant to relief in the the first instance, in the case before us the United States Attorney, in fact, both sought from the Department of Justice and was granted permission to prosecute applellants.

4. Appellant Frank argues that there was insufficient credible evidence upon which to convict him. However, appellant bears a very heavy burden on such a claim, and issues of credibility are ex-

clusively within the province of the jury. See United States v Losada, 674 F.2d 167, 173 (2d Cir.) cert. denied, 102 S. Ct 2945 (1982). In this case, taking the view most favorable to the government, there is substantial evidence supporting appellant's conviction. Appellant points to the state court judge's determination that certain of the government witnesses' testimony was "totally unworthy of belief", People v Grillo, No. 2202/81, slip op. at 5 (Suffolk County Ct. May 6, 1982). But that comment was made with regard to another defendant by the state judge as the trier of fact. In the case before us, the jury was the trier of fact and may well have weighed the credibility of the witnesses differently with respect to this appellant. Moreover, as the court below held, the jury could have believed other

aspects of the challenged testimony connecting applellant with the large scale smuggling operation taking place around him.

5. Appellant Frank's contention that it was error to admit evidence of guns in his possession is without merit. Proof of possession of weapons is admissible in a narcotics conspiracy case as indicative of "tools of the trade". See United States v Barnes, 604 F.2d 121, 166-67 (2d Cir. 1979), cert denied, 446 US 907 (1980). In addition, proof of weapons possession by appellant corroborated the police officer's testimony with respect to his identification of appellant as a participant in the unloading of the drugs.

6. We have considered all of appel- lants' contentions and find them to be without merit.

WILFRED FEINBER,
Chief Judge

AMALYA L. KEARS, Circuit Judge

EDWARD D. RE, Chief Judge,
United States Court of
International Trade

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwes used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twelfth day of April, one thousand nine hundred and eighty-three.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. Nos. 82-1326

JOSEPH WILLIAM FRANK and 82-1328

NICHOLAS SILANO,

Defendants-Appellants.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herby counsel for

the defendants-appellants, Joseph William Frank and Nicholas Silano,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by

Francis X. Gindhart,

Chief Deputy Clerk